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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1046

THE PRESS CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent;*
TRI-CITY NEWSPAPER GUILD ET AL.,
Intervenors-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

ELISHA HANSON,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Press Co., Inc., respectfully petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia to review a decree of said court entered on December 9, 1940 (R. 1331-1333) and modified February 14, 1941 (R. 1345-1346) and March 24, 1941 (R. 1358-1359), modifying and enforcing as modified an order of the National Labor Relations Board (hereinafter called the Board) which directed petitioner to cease and desist

from certain unfair labor practices under the National Labor Relations Act (hereinafter called the Act) 49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151 *et seq.* and to take certain affirmative action.

The opinions of the court below (R. 1307-1329, 1345-1346, 1354-1357, 1359-1360) are as yet unreported. The decision and order of the Board are reported in 13 N. L. R. B. 630.

A.

Summary Statement of the Matter Involved.

The Press Co., Inc., since August 1, 1937, has owned and published in Albany, New York, an afternoon newspaper known as the "Knickerbocker News" (R. 1217). On June 30, 1937, petitioner, confronted with continuing losses in its operations (R. 152), was compelled to abandon its morning and Sunday newspapers theretofore published and to publish thereafter only an afternoon newspaper.

This reduction of operations necessitated a reduction of petitioner's staff by the discharge of more than 150 employees in all departments (R. 110, 1224). The selections of the employees to be retained were made by department heads who were instructed to retain persons best equipped to serve on the basis of merit and fitness, irrespective of seniority or other considerations (R. 821, 1100-1101). The lists of retained employees were submitted to the publisher for his approval and approved by him (R. 822, 1103).

Pursuant to the foregoing instructions Lewis, petitioner's editorial director, found it necessary to discharge 29 editorial employees. Thereupon the Tri-City Newspaper Guild (hereinafter called the Guild) demanded that petitioner reinstate seven named employees, including Scannell, Wanhope and Christman, the three editorial employees involved in this petition (Board Exhibit 74). Two of these seven employees disavowed authority of the Guild to act for them

and denied any discriminatory act by petitioner (R. 444, 836, 839, 842-843).

The Guild's demand was rejected, whereupon it filed charges with the Department of Labor of the State of New York alleging discrimination in the discharge of six named employees by reason of their activity in or in behalf of the Guild (R. 446). After petitioner offered in good faith to abide by the finding of the State Mediator (Board Exhibit 76, 80) the Guild withdrew from the proceedings and filed charges with the Board herein (R. 448).

The Board issued its complaint against petitioner and Gannett Co., Inc., which owned all of the common and half of the preferred stock of petitioner, charging violation of Section 8 (1) and (3) and Section 2 (6) and (7) of the Act (R. 46-50). On July 18, 1939, the Board entered its order which, *inter alia,* required the reinstatement by petitioner with back pay of Scannell, Christman and Wanhope (R. 1230-1232).

The court below modified the Board's order in certain respects but as modified enforced the order with respect to Scannell, Christman and Wanhope, holding, in effect, that the findings of the Board therewith were sustained by the evidence (R. 1310-1315).

In modifying the Board's order the court below, *inter alia,* set aside paragraph 1 (c) thereof (R. 1319) which ordered respondent to cease and desist from

> "In any manner interfering with, restraining, or coercing their employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act" (R. 1230-1231).

Subsequently, on petition of the Board for rehearing on the sole ground that the court below committed error in eliminating paragraph 1 (c) of the Board's order (R. 1334-1343), the court below ordered the reinstatement of the said paragraph (R. 1345-1346).

Thereafter this Court in *NLRB* v. *Express Publishing Co.*, No. 442, this Term, decided March 3, 1941, set aside a paragraph in a Board order expressed in language identical to paragraph 1 (c) in this case. Upon request of the court below memoranda were filed by the parties concerning the pertinence of the *Express Publishing Company* decision to the present case (R. 1346-1348, 1348-1354). The court below thereupon ordered a modification of paragraph 1 (c) to read as follows:

> "In any manner interfering with the administration of the Guild or its membership" (R. 1358).

B.

Statement Disclosing Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C., Sec. 347 (a)), and Section 10 (e) and (f) of the Act. The decree of the United States Court of Appeals for the District of Columbia to be reviewed was entered on December 9, 1940 (R. 1331-1333) and modified February 14, 1941 (R. 1345-1346) and March 24, 1941 (R. 1358-1359).

At the opening of the Board hearings the Trial Examiner denied petitioner's motion to dismiss based on the grounds that (1) the Board lacked jurisdiction and (2) the proceeding was in violation of petitioner's rights as guaranteed by the First and Fifth Amendments to the Constitution of the United States (R. 76, 77). These contentions were either rejected or disregarded in the findings and con-

clusions of the Board pursuant to which its order against petitioner was entered (R. 1211-1232).

Upon review of the Board's order by the court below these contentions were again asserted but were decided adversely to petitioner. The court below also rejected petitioner's contention that the findings of fact of the Board with respect to the parts of the Board's order enforced by the court below were not supported by substantial evidence.

The conclusions of the court below present for determination: (a) important questions of Federal law which have not been, but should be, settled by this Court; (b) Federal questions decided by the court below in a way probably in conflict with applicable decisions of this Court; (c) an important Federal question of whether the court below has so materially departed from the course of judicial review contemplated by the Act as to call for an exercise of this Court's power of supervision.

C.

Statute and Constitutional Provisions Involved.

The pertinent provisions of the National Labor Relations Act (49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151 *et seq.*) are set forth in Appendix B at pages 61-66.

The text of Article I, Section 8 and the First and Fifth Amendments to the Constitution of the United States is set forth in Appendix B at pages 60-61.

D.

Questions Presented.

1. Whether the Board has jurisdiction over the labor relations of an employer who publishes a newspaper of which only 559 copies out of a total of 55,875 circulate outside of the State of publication and which is a unit of a business that as a whole is inherently local.

2. Whether under the Act the court below in the course of judicial review of the Board's order is authorized to arrive independently at its own findings of fact and to draw inferences not drawn by the Board to support a paragraph of the Board's order which is not otherwise based upon findings of fact supported by substantial evidence.

3. Whether the requirement of substantial evidence is satisfied by inferences drawn from the failure of one executive of the employer to testify where such inferences alone are relied upon to give vitality to circumstantial evidence otherwise considered as lacking in rational probative force.

4. Whether it is an unfair labor practice in the course of reducing a staff to discharge (a) a city editor who habitually failed to comply with instructions of his superior; (b) an employee who lacked the qualities of versatility and cooperativeness and above all entertained avowed Communistic views creating a bias incompatible with the effective performance of the duties of an editorial worker; and (c) an employee whose work was distinctly below average, sloppy and inferior, who himself recognized his own inadequacies, and who improperly had come into possession of the stenographic notes of his editorial director's confidential secretary.

5. Whether the freedom of the press as guaranteed by the First Amendment to the Constitution of the United States is abridged where the Board's order (a) superimposes its judgment over that of the publisher of a newspaper in the selection and assignment to work of editorial employees on the basis of fitness and merit; (b) in effect compels the publisher to lay before the Board for review the reasons why one editorial employee was selected as against another; and (c) rests upon unfavorable inferences which came into being only by reason of the failure of the publisher's editor-

ial director to testify concerning his exercise of judgment as to the relative merits of particular editorial employees.

6. Whether a full and fair hearing as guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States is denied where, prior to the issuance of a complaint and hearings thereon, there is positive evidence not challenged by the Board during the hearing that officials of the Board were credited by the complaining union with having given assurances to that particular labor organization of an outcome favorable to said organization; and where such prejudgment is further supported by evidence of statements and conduct of the Board's attorney, the conduct of the Trial Examiner and a systematic disregard by the Board in arriving at its findings of evidence favorable to the employer.

7. Whether the Board, upon finding that an employer has engaged or is engaging in specific unfair labor practices, is empowered to order the said employer to cease and desist from other practices not found to be pursued and which are unrelated to and not forseeable from the past conduct concerning which the Board has made findings.

E.

Reasons Relied On for the Allowance of the Writ.

1. *A novel question of jurisdiction over an inherently local business which is a unit of a business in general inherently local and not of a national character.*

This Court has not passed upon an important Federal question of jurisdiction presented by the specific factual situation herein.

The court below failed to discharge its judicial duty of ascertaining whether petitioner's activities affected commerce in such a close and substantial manner as to enable

the Board to exercise jurisdiction over its labor relations. It merely recited certain findings of the Board with respect to petitioner's operations, and, without any analysis of the effects of the facts found, erroneously held that under the rule announced by this Court in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937) and *NLRB* v. *Fainblatt*, 306 U. S. 601 (1939) petitioner's activities affected interstate commerce.

This Court has held that the business of preparing, publishing and printing a daily newspaper is peculiarly local and distinct from its circulation whether or not that circulation crosses state lines. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). And see *Blumenstock* v. *Curtis Publishing Co.*, 252 U. S. 436 (1920).

The record clearly demonstrates that petitioner is engaged in a purely local business, namely, furnishing information in the form of news, editorial comment and advertising to the people in the area immediately surrounding Albany, the place of publication.

The court below erroneously stated that 2,000 out of a total in excess of 45,000 copies of petitioner's newspapers circulated outside the State of New York (R. 1310). No such finding was made by the Board (R. 1217-1218). At no time did the out-of-state circulation of any of petitioner's newspapers reach that figure (R. 1217-1218) and in September, 1937, a month typical of petitioner's circulation since its reduction of operations, only 559 copies out of a total of 55,875 of petitioner's newspaper circulated outside the State of New York, despite the close proximity of Albany to cities and towns in Vermont and Massachusetts (R. 107, 1217).

This trivial out-of-state circulation is inherent in the local nature of petitioner's business. Petitioner's newspaper is a unit of a business which in general is inherently of

a local as distinguished from a national character. The dominant aspect is service to the community in which the individual unit of the business is located.

On all the existing circumstances established by the record petitioner's operations do not have a close and substantial relation to interstate commerce. In all of the cases decided by this Court under the Act the employer was dependent upon the channels of commerce for the distribution of his product.[1] That fact is non-existent herein.

The court below also relied upon petitioner's membership in the Associated Press [2] and its use of raw materials, advertising and features received from other states to support the jurisdiction of the Board. Whether this can be done presents an important Federal question upon which there is no controlling decision of this Court.

The court below went to lengths never gone to by this Court in upholding Federal intervention in an inherently local business. Petitioner submits that this Court should review that important Federal question.

2. *Departure from the course of judicial review contemplated by the act requiring exercise of this Court's power of supervision.*

A fundamental Federal question which calls for the exercise of this Court's power of supervision is presented by the departure by the court below from the course of judicial review contemplated by the Act as interpreted by this Court.

This Court has recently warned that the Board has the exclusive power to find the facts, *NLRB* v. *Waterman Steamship Corp.*, 309 U. S. 206 (1940) and that "Congress en-

[1] E.g., *NLRB* v. *Fainblatt*, 306 U. S. 601, 607-608 (1939); *NLRB* v. *Bradford Dyeing Association*, 310 U. S. 318, 326 (1940).

[2] In *Associated Press* v. *NLRB*, 301 U. S. 103 (1937) the employer held subject to the Act was directly engaged in interstate communication.

trusted the Board, not the courts, with the power to draw inferences from the facts'', *NLRB* v. *Link-Belt Co.*, 311 U. S. 584 (1941).

The court below ignored the limitations upon judicial review contained in the foregoing warning in its review of the evidence of surveillance. It first refused to sustain the conclusion of the Board that surveillance *ipso facto* violated the law (R. 1315). It then took it upon itself to arrive independently at a finding of preliminary fact based upon evidence that ''on the day following the Guild meetings Lewis was in possession of detailed information concerning what went on at the meetings and what the Guild was planning'' (R. 1315) and further evidence, which the court said was ''not referred to by the Board'' that ''during a number of conferences Lewis assured employees that 'they [the employers] were well apprised of what was happening in the Guild' '' (R. 1315).

Obviously no such finding was made by the Board since the Board, in the words of the court below, did not even refer to the evidence in question.

Finally, the court below arrived independently at a new finding of ultimate fact, namely, that the knowledge acquired by petitioner's editorial director did actually interfere with union activity (R. 1315). No such finding was made by the Board.

The effect of the action of the court below was to establish two findings of fact—one preliminary, the other ultimate—to supply a causative factor essential to the enforcement of paragraph 1 (b) of the Board's order which the court below admitted would otherwise have been unenforceable.

This Court should review these departures from the scope of judicial review permitted by the Act.

3. *Inferences from failure to testify as substantial evidence—a unique question of judicial review.*

The court below characterized as "the real bone of contention in this case" the question of whether Lewis, petitioner's editorial director, purposely availed himself of the opportunity to reduce his staff to discriminate, because of his personal animosity toward the Guild, in the discharge of certain editorial employees, including Scannell, Wanhope and Christman, the three employees involved in this petition (R. 1312).

On this question the court below admitted there was no direct evidence but sustained the Board's finding of discrimination on the basis of inferences drawn by the Board from circumstantial evidence which the court below described as follows: oral statements of Lewis; his asserted familiarity with the activities of Guild members; his failure to testify; the excessive proportion of Guild members selected for dismissal; a rather casual appraisal of the relative merits of employees (R. 1312).

But all of these inferences were held by the court below to rest upon Lewis' failure to testify as shown by the following statement from its opinion:

> "*If, in this state of the record, Lewis had gone on the witness stand and testified* that he had exercised the right to discharge Scannell, Wanhope, and Christman because he was able to retain other men who were their superiors in the work of the newspaper, or because of any dereliction on their part in the discharge of their duties, or that in making his selections he had weighed the relative merits of those whom he retained and those whom he discharged and had based his selection on the ground of merit alone, *the case would have a different aspect. But since he refrained from testifying at all, we are unable to say that the factor of Guild activity, which the Board considered the real cause, can be said to be without support in the evidence.*" (Emphasis supplied) (R. 1312).

This means that the court below in effect held that were it not for Lewis' failure to testify, the circumstantial evidence hereinabove mentioned would have no separate significance and that Lewis' failure to testify gave vitality to this circumstantial evidence which the court below otherwise considered to be lacking in rational probative force.

It is submitted that the requirement under the Act of substantial evidence as governed by the criteria announced by this Court in *Consolidated Edison Co.* v. *NLRB,* 305 U. S. 197 (1938) and *NLRB* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292 (1939) cannot be satisfied by relying solely upon inferences drawn from the failure to testify of petitioner's editorial director. Such inferences in the words of this Court in the *Columbian Enameling* case, would not constitute evidence

> "* * * to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it in one of fact for the jury." (306 U. S. at page 300.)

Inferences from the failure of one person to testify cannot be regarded as substantial evidence where such inferences are not otherwise rested upon evidence of rational probative force. Inferences of this sort cannot be considered

> "* * * such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Company* v. *NLRB,* 305 U. S. 197, 229 (1938).

The holding of the court below is in conflict with the criteria announced by this Court in the *Consolidated Edison* and *Columbian Enameling* cases, *supra,* and raises an important Federal question which should be decided by this Court.

4. *A particular form of abridgment of the guaranty of a free press not heretofore received by this Court.*

This Court has never had occasion to consider the particular form of abridgment of the constitutional guaranty of a free press presented by the record in this case.

The Board as an agency of Congress claimed the power to require petitioner to lay before it for review the reasons why one editorial employee was selected as against another.

Petitioner contended that by reason of the First Amendment the Board has no such power (R. 54-56, 66-67, 76, 85, 1173). The First Amendment vouchsafes to the publisher the final responsibility for the selection and assignment to work of editorial employees deemed by him to be qualified by reason of fitness and merit to effectuate the editorial policies of his newspaper (R. 54-55). Petitioner refused to surrender and transfer that final responsibility to the Board.

The fitness and merit of particular editorial employees retained as against particular editorial employees discharged is exclusively a matter of the judgment of the publisher (R. 54-55).

All the Board could constitutionally require was a showing that the discharges in controversy herein were not made because of Guild membership and activities. Such a showing was made by overwhelming evidence that the discharges which were necessitated by the reduction of petitioner's operations were governed wholly by considerations of fitness and merit and were approved by the publisher (R. 822, 1103).

These criteria are in the record (R. 54-55). The final judgment of the publisher in applying the criteria to particular individuals is secured by the First Amendment against abridgment.

On this issue the court below sustained the findings of discriminatory discharges on the basis of unfavorable in-

ferences which came into being only because of the failure of petitioner's editorial director to testify concerning why he chose one editorial worker as against another. Without these inferences the court below said "the case would have a different aspect" (R. 1312).

For the reasons already stated the First Amendment precluded the Board from drawing such inferences. The guaranty of a free press would be devitalized if the right of a publisher to resist a review by the Board of his judgment with respect to the value of particular editorial employees is turned against him as evidence of any character.

This Court has never passed upon this Federal question in the particular form of abridgment of the guaranty of a free press here presented. In *Associated Press* v. *NLRB*, 301 U. S. 103 (1937), which the court below failed to distinguish, the issue presented to this Court was the power of the Board to order the reinstatement of an editorial worker upon the basis of an unchallenged finding of fact that his Guild activity was the reason for his discharge.

No such issue is here presented. The Board's findings of discriminatory discharges were vigorously challenged (R. 15-19). The record herein discloses by substantial evidence that the discharges were made pursuant to the discretion of the publisher in enforcing editorial policies of his own choosing by selecting for retention editorial employees whom he regarded as best adapted on the basis of merit and fitness to effectuate such policies (R. 54-55, 821, 1100-1101). There is no substantial evidence to the contrary.

If the Board can superimpose its judgment over that of the publisher on the foregoing matters then a "pervasive threat of censorship" has come into existence. Cf. *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940).

This Court should review the novel constitutional question thus presented.

5. Violation of due process of law under circumstances never before reviewed by this Court.

Petitioner's contention that the proceedings, findings and order of the Board violated its substantial rights as guaranteed by the due process clause of the Fifth Amendment presents a question of constitutional right under circumstances never before reviewed by this Court.

The court below said:

> "* * * there was no showing from which we can or should infer that either the trial examiner or the Board members had made statements showing prejudgment of the case. If any statements made by the prosecuting arm of the Board created the unfortunate impression that the case was foreclosed before it was begun, this was the result of those provisions of the statute which combine in the same agency not only the power to investigate, initiate, and prosecute, but as well the power to hear and decide. But responsibility for such matters is with the legislature and not with us. What is complained of as later occurring in the argument, may reasonably be considered as having resulted from the implications of counsel's remarks, and we know of no rule of judicial conduct applicable either to court or board which requires silence in the face of an imputation of dishonorable conduct." (R. 1309-1310.)

The foregoing statement both misconceives the duty of the reviewing court and inaccurately characterizes petitioner's contentions.

The responsibility for due process ultimately rests upon the court and not upon the legislature. The very fact that the provisions of the statute telescope into a single agency prosecuting and judicial functions imposes upon the court an even greater responsibility to scrutinize the record for material departures from the historical and traditional processes which are of the essence of fair adjudication.

Questions of constitutional right are always open to ex-

amination by the court.[3] There must be fairness in substance, tendency and effect, not merely formal fairness.

Since the court below disavowed responsibility for the results of the commingling of prosecuting and judicial functions in the same agency, petitioner has no assurance that the circumstances set forth in the record and upon which its contention of violation of due process was based were given the scrutiny to which they were entitled.

At every stage of the proceedings petitioner insisted that it had been denied due process by being deprived of an impartial hearing (R. 51, 57, 68, 77, 218, 1173, 1207-1208).

Petitioner's contention was based upon (a) positive evidence that prior to the issuance of a complaint and hearings thereon, officials of the Board were credited by Guild members with having given assurances to the Guild of an outcome favorable to it (Board Exhibit 86; Petitioner Exhibit 4; R. 956, 986) and this evidence was unchallenged and undenied by the Board during the hearing; (b) further positive evidence substantiating such prejudgment as shown by statements of the Board's attorney (R. 162, 163), his conduct in acting as agent for the Guild (R. 757) and the conduct of the Trial Examiner (R. 218, 1173, 1207-1208); and (c) systematic disregard by the Board in arriving at its findings of evidence favorable to the petitioner.

There is no basis in the record to warrant the conclusion of the court below that the remarks of petitioner's counsel during oral argument before the Board carried an imputation of dishonorable conduct (R. 1309-1310).

In the light of the record counsel for petitioner would have been derelict in his duty had he failed to call the attention of the Board to matters supporting the charge that the Board had prejudged the case. These matters stood unchallenged in the record and the Trial Examiner made no reference to them in his report to the Board (R. 1173, 1207-

[3] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47 (1937).

1208). Having discharged his duty in that respect counsel for petitioner felt that the record spoke for itself.

A charge of prejudgment is a charge of bias. Similar charges have been made in other cases before the Board and were sustained by the courts.[4] In this case the record shows that officials of the Board opened themselves to the charge that they conceived their role to be that of partisans. A statute which consolidates in the same agency the functions of investigation, prosecution and decision itself creates the very processes by which freedom of quasi-judicial officers from bias or partisan viewpoints is likely to be impaired. Uncontradicted evidence in the record shows that under the circumstances of this case petitioner had more than reasonable grounds to believe that it had been deprived of the protection of due process.

A charge of bias is not necessarily to be characterized as an imputation of dishonorable conduct. The system of adjudication sanctioned by the statute herein may be so self-defeating of impartial judgment in the controversial field of labor as to lead officials sincerely to believe that it is their duty to play the role of the advocate of the employees.

Lack of separation of functions increases the danger that the system may germinate this conviction in the minds of officials who were intended to perform quasi-judicial functions. In this setting a charge of prejudice properly raises the constitutional issue that the Board's practices are repugnant to due process.

This Court should review the fundamental question of constitutional right thus presented under circumstances not heretofore considered by this Court.

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[4] *Inland Steel Co.* v. *NLRB*, 109 F. (2d) 9 (C. C. A. 7th, 1940); *Montgomery Ward & Co.* v. *NLRB*, 103 F. (2d) 147 (C. C. A. 8th, 1939).

6. *The scope of paragraph 1 (c) of the order is in conflict with the principles announced by this Court in NLRB* v. *Express Publishing Company.*[5]

If this Court were to affirm the judicial review of the Board's findings by the court below, then an important question is presented concerning the scope of paragraph 1 (c) of the order as modified by the court below (R. 1358).

In its original decree the court below eliminated paragraph 1 (c) of the Board's order as set forth at page 3 herein (R. 1319). Subsequently, upon petition of the Board for rehearing the court below restored the said paragraph (R. 1345-1346). Thereafter, on the authority of *NLRB* v. *Express Publishing Co., supra,* the court below in its final decree modified paragraph 1 (c) to read as follows:

> "In any manner interfering with the administration of the Guild or its membership". (R. 1358.)

On the assumption that this Court ultimately approves the review of the evidence by the court below, it is submitted that paragraph 1 (c) as modified is not supported by the Board's findings and thus fails to conform to the principles announced by this Court in the *Express Publishing Company* case.

That case expresses the general principle that the order of the Board cannot restrain practices unrelated to and not forseeable from the past conduct of the employer concerning which the Board made findings.

The only practices with respect to which the Board's findings were upheld by the court below are discriminatory discharges in violation of Section 8 (1) and (3) (R. 1310-1312), and surveillance in violation of Section 8 (1) of the Act (R. 1315). Assuming arguendo that this Court sustains these findings, then paragraphs 1 (a) and 1 (b) of the

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[5] No. 442, this Term, decided March 3, 1941.

order fully restrain these practices and embrace every act the threat of which in the future is indicated because of similarity or relation to the practices found by the Board to have been committed by the petitioner in the past. These paragraphs would then be adequate to prevent the order from being "evaded by indirections or formal observances".

There is no justification under such circumstances for any additional injunctive provision. Paragraph 1 (c) is directed against a new violation unlike and unrelated to those in which petitioner was found to have been engaged.

The court below erroneously broadened the practice of surveillance to include new and different acts, *viz:* interference with the administration of the Guild or its membership in any manner. This was done on the untenable theory that such acts are related to conduct of a general nature in which petitioner was found to have engaged.

Nothing could be further from the limited aspect of this case. The court below held that the only practices herein sustained by the evidence were surveillance and discriminatory discharges (R. 1310-1315). It also held that there was no evidence of other coercion, restraint or interference (R. 1319, 1345). It conceded that this case does not have the complexion of the series of varied acts disclosed in *NLRB* v. *Fansteel Corp.*, 306 U. S. 240 (1939) (R. 1357).

If it be finally held that this review of the evidence is correct, on what basis then, could the breadth of the language of paragraph 1 (c) be justified? Interference with the administration of a labor organization is specifically prohibited by Section 8 (2) but petitioner was not charged with or found to be violating this provision of the Act. Why was this part of Section 8 (2) dragged into the order when the court below admitted that all of the other practices condemned by Section 8 (2), (4) and (5) were out-

side the scope of the conduct which petitioner was found by the Board to have committed?

It is indisputable that the court below has revived in another guise the catch-all provision condemned by this Court in the *Express Publishing Company* case. Paragraph 1 (c) virtually orders desistance from any unfair labor practice in violation of the Act. This is apparent from a glance at each subdivision of Section 8 of the Act which might be so interpreted as to subject petitioner to the peril of a contempt proceeding based upon an allegation, however remote, of some form of interference with the administration of the Guild or its membership.

Such broad language will hang over petitioner's head like the proverbial sword of Damocles.

In view of the grave uncertainties created by the vague contours of the language of paragraph 1 (c) if the Board's findings are ultimately sustained, an important question is presented for clarification by this Court of the applicability of the principles anounced in the *Express Publishing Company* case. This question of the administration of the Act should be reviewed by this Court in the interest of litigants who otherwise will be exposed to undue risks of a summons for contempt.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, to the end that this cause may be reviewed and determined by this Court; that the decree of the said Court of Appeals enforcing with modifications the Board's order be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

ELISHA HANSON,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

THE PRESS CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent;

TRI-CITY NEWSPAPER GUILD ET AL.,

Intervenors-Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Preliminary Statement.

The opinions below, the statement of the matter involved, jurisdiction and the questions presented appear in the Petition for a Writ of Certiorari herein and in the interest of brevity are incorporated here by reference.

II.

ARGUMENT.

Summary of Argument.

Point I. Petitioner's operations do not affect commerce in such a direct and substantial manner as to enable the

Board to exercise jurisdiction over its labor relations. In the circumstances of this case a novel and important question of commerce is presented.

Point II. The enforcement by the court below of paragraph 1 (b) of the Board's order directed against surveillance constitutes a material departure from the course of judicial review under the Act as interpreted by this Court because it is based upon findings of fact made independently by the court below and not found by the Board. A significant Federal question requiring the exercise by this Court of its power of supervision is thus presented.

Point III. The court below erroneously regarded as substantial evidence of discriminatory discharges inferences drawn from the failure of one person to testify where such inferences were relied upon to give vitality to circumstantial evidence otherwise regarded by the court as lacking in rational probative force. This unique question of judicial review should be passed upon by this Court.

Point IV. The order of the Board constitutes an infringement of the freedom of the press as guaranteed by the First Amendment to the Constitution of the United States by a particular form of abridgment not heretofore reviewed by this Court.

Point V. The proceedings, findings and order of the Board violate petitioner's substantial rights as guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States. This fundamental question of constitutional right is presented under circumstances never before reviewed by this Court.

Point VI. Paragraph 1 (c) of the Board's order as modified by the court below is in conflict with the principles announced by this Court in *NLRB* v. *Express Publishing Com-*

pany, No. 442, this Term, decided March 3, 1941. The grave uncertainties created by the vague contours of the language of this paragraph present an important question which should be clarified by this Court in the interest of litigants who otherwise will be exposed to undue risks of contempt proceedings.

Point I.

Petitioner's operations do not affect commerce in such a direct and substantial manner as to enable the Board to exercise jurisdiction over its labor relations. In the circumstances of this case a novel and important question of commerce is presented.

The court below failed to discharge its judicial duty of ascertaining whether, on the facts of this case, petitioner's activities affected commerce in such a close and substantial manner as to render regulation necessary or appropriate for the protection of commerce. Instead, it merely recounted certain of the Board's findings with respect to petitioner's operations and, without any analysis of the effects of the facts found on interstate commerce in the light of the criteria announced by this Court, disposed of petitioner's contentions by holding that

> "This is a sufficient finding that Press Co.'s operations affect interstate commerce under the rule announced by the Supreme Court in *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and in *Labor Board* v. *Fainblatt*, 306 U. S. 601, 607, in which it is said that the regulatory power of Congress over interstate commerce is not dependent upon whether the volume is great or small." (R. 1310.)

The court below went to lengths never gone to by this Court in upholding Federal intervention in an inherently local business. Petitioner submits that this Court should review that important Federal question.

This Court has uniformly held that manufacturing and activities analogous thereto are not commerce. *United States* v. *F. W. Darby Lumber Co.*, 60 Sup. Ct. 451, 456 (1941). And see *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 34 (1937) and cases therein cited. The business of publishing a daily newspaper is well within this rule.

Since the production of a daily newspaper is not commerce, the Board had jurisdiction only if the illegal activities alleged to have occurred in this case had or tended to have the requisite direct and substantial effect upon interstate commerce. Only by a careful analysis of the facts surrounding petitioner's business can it be determined whether such effect could ensue from the practices found to be in violation of the Act.

This Court has held that the business of preparing, publishing and printing a daily newspaper is peculiarly local and distinct from its circulation whether or not that circulation crosses state lines. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). And see *Blumenstock* v. *Curtis Publishing Co.*, 252 U. S. 436 (1920).

The record herein demonstrates that petitioner is engaged in a purely local business, that of furnishing information in the form of news, editorial comment and advertising of importance to the people in the area immediately surrounding Albany, the place of publication.

The court below erroneously stated that 2,000 out of a total in excess of 45,000 copies of petitioner's newspapers circulated outside the State of New York (R. 1310). No such finding was made by the Board (R. 1217-1218). At no time did the out-of-state circulation of any of petitioner's newspapers reach that figure (R. 1217-1218) and in September, 1937, a month typical of petitioner's circulation since its reduction of operations, only 559 copies out of a total of 55,875 of petitioner's newspaper circulated outside the State of New York, despite the close proximity of Al-

bany to cities and towns in Vermont and Massachusetts (R. 107, 1217). This trivial out-of-state circulation is merely incidental to petitioner's primary function of making available to residents of Albany and its vicinity information about matters of importance to them.[1]

Petitioner's trifling out-of-state circulation is characteristic of the newspaper publishing business. This is illustrated by the circulations of other newspapers affiliated with the Gannett Company. The Rochester Democrat & Chronicle for the year ending September 30, 1937 had an average circulation of 81,239 of which less than 410 copies (less than ½ of 1 per cent) were sent to subscribers in states other than New York (R. 198). The average circulation of the Rochester Times-Union for the same period was 82,208. Of these, an average of only 206 (less than ¼ of 1 per cent) circulated in other states (R. 198). The exhibits herein contain detailed information concerning the circulation of 16 newspapers affiliated with the Gannett Company.[2] Out of a total circulation of 402,508 only 12,-

[1] That petitioner's operations are of purely local importance is equally forcefully demonstrated by the extent to which circulation is concentrated in Albany and its periphery. The Knickerbocker Press, the morning newspaper published by petitioner until its union with the Albany Evening News, had an average net paid circulation of 25,639 for the twelve month period ending September 30, 1936 (Bd. Ex. 26). Of that circulation, 48 per cent was distributed entirely within the "city zone", comprising the area within the corporate limits of Albany, Renssalaer and Menands, New York. An additional 24.8 per cent was distributed within the "retail trading zone", an area which extends north to Ballston Spa (30 miles), east to Lebanon Springs (22 miles), south to Catskill (31 miles) and west to Cobleskill (45 miles) and includes all intervening points except those included in the city zone (Bd. Ex. 26). Of the circulation of the Sunday edition of the Knickerbocker Press, 80 per cent was distributed within the city and retail trading zones (Bd. Ex. 26).

For the same period the Albany Evening News had an average net paid circulation of 41,847, of which 53 per cent was distributed within the city zone and an additional 31 per cent within the retail trading zone (Bd. Ex. 27).

[2] Detailed figures are set forth in Appendix A at page 60.

672 are distributed in states other than the state of publication, an average out-of-state circulation of 3.15 per cent. Even this insignificant out-of-state circulation total includes newspapers published in cities located close to state lines, whose retail trading zones extend into two states. Omitting those newspapers from the calculation, the total circulation is 338,819 and the out-of-state circulation is 2,214 or less than ⅔ of 1 per cent.

These figures conclusively demonstrate that not only the business of this petitioner, but that of the newspaper publishing business in general is of exclusively local as distinguished from national interest.

It therefore becomes of utmost importance to bear in mind the circumstances in which this Court has held that labor relations are subject to the regulatory power of Congress.

In *Associated Press* v. *NLRB*, 301 U. S. 103 (1937) the employer held subject to the Act was directly engaged in interstate communication.

It would be both presumptuous and a work of supererogation to enlarge upon the principles applied by this Court in cases involving labor relations in industrial activities.[3] None of these cases is determinative of the issues herein. In each case the employer was dependent upon the channels of commerce for the distribution of his product. This is not the fact herein.

The *Jones & Laughlin* case, relied upon by the court below, involved the fourth largest producer of steel in the United States, a corporation which, with its nineteen sub-

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[3] *NLRB* v. *Jones & Laughlin Steel Corp., supra.*
NLRB v. *Fruehauf Trailer Co.*, 301 U. S. 49 (1937).
NLRB v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58 (1937).
Santa Cruz Fruit Packing Co. v. *NLRB*, 303 U. S. 453 (1938).
Consolidated Edison Co. v. *NLRB*, 305 U. S. 197 (1938).
NLRB v. *Fainblatt*, 306 U. S. 601 (1939).
NLRB v. *Bradford Dyeing Association*, 310 U. S. 318 (1940).

sidiaries, constituted a completely integrated enterprise owning and operating numerous mining properties and interstate transportation facilities.

This Court has said that a mere reference to percentages cannot be deemed controlling on the question of whether specified activities affect commerce. Cf. *NLRB* v. *Fainblatt*, 306 U. S. 601, 606 (1939). But this language was used with reference to industries dependent upon the channels of commerce for the distribution of their products, in which a vast number of units contribute in the aggregate a tremendous volume of interstate commerce and industries in which the total effect upon commerce of the practices of many small producers may be great.

The publication of daily newspapers is a business which operates in a manner diametrically opposed to that of the manufacturing, processing and packing industries involved in the above-mentioned cases. The dominant aspect is not nationwide distribution of goods but service to the community in which the individual unit of the business is located (R. 107; Appendix A at page 60). The service rendered by each unit is peculiarly adapted to a strictly limited area.

The lack of relation of this petitioner to interstate commerce, when considered in conjunction with the peculiarly local nature of the business as a whole, establishes that regulation of the labor relations of employers and employees engaged therein is a matter of purely local concern, beyond the scope of the power of Congress "to regulate Commerce * * * among the several States".

Petitioner's membership in the Associated Press has been asserted as a basis of jurisdiction (R. 1218, 1310).

The contention is that if an unfair labor practice should lead to a strike among petitioner's employees and if this strike should force petitioner to cease publication, the Associated Press' interstate business would be affected. The

Board has insisted that it is entitled to regulate petitioner's labor relations in order to protect the Associated Press' interstate activities from the effect of a stoppage of work by petitioner's employees.

Because petitioner is one of its members, the Associated Press is entitled to use certain news dispatches published in petitioner's newspaper (R. 174-175, 1206). The Board has found that "The Albany office of the Associated Press sends out about 36,000 words a day, about 200 or 300 of which usually are taken from material furnished by the respondent Press Co." (R. 1218). These 200 words go only to one point in Pennsylvania (R. 176). Before leaving the state over any wire, the story is sent to New York, rewritten and cut to 75 words (R. 176).

If petitioner's editorial employees should cease working, the greatest possible effect upon the interstate business of the Associated Press would be the loss of material from which it takes an insignificant part of its outgoing news.

The record shows that the Associated Press is in no way dependent upon petitioner for Albany coverage. The Associated Press maintains its own bureau in Albany in which there are eleven editorial employees of the Associated Press (R. 169). Further, the Associated Press had another Albany member (R. 171).

The Board also found that the Associated Press supplies petitioner with a substantial number of the news dispatches which it uses each day (R. 1218). It has not explained how petitioner's failure to take this news would affect the transmission of news in any way. The record demonstrates that it would not (R. 168-179).

If petitioner took no Associated Press news whatsoever, the same amount of news would have to be sent to the Albany office so that it could service the newspapers which depend upon the New York State relay wire and at the same

time supply its other Albany member with news (R. 170-171).

Petitioner submits that a stoppage of work among its editorial employees would not burden or obstruct the interstate activities of the Associated Press in such a substantial manner as to permit the Board to use petitioner's Associated Press membership as a basis of jurisdiction. The record contains no proof of any possible damage to the Associated Press if petitioner suspended operations altogether.

The court below relied in part upon the receipt by petitioner of advertising and feature material from other states in supporting the jurisdiction of the Board (R. 1310). There is nothing in the record to show that a direct or substantial burden on commerce would result from a failure to receive these materials.

Moreover, this Court has held that "the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce". *Western Live Stock* v. *Bureau of Revenue, supra* at page 258.

No logical distinction can be drawn between the publication of advertising and the publication of features so far as the "peculiarly local" character of the business is concerned.

In its description of petitioner's business the Board found that petitioner uses raw materials which are shipped to it across state lines (R. 1218). It further found that the raw materials used by petitioner represent 10 per cent to 30 per cent of the cost of producing its newspaper (R. 1218).

But this Court has never found that commerce would be burdened or obstructed in the requisite direct and substantial manner by an employer's failure to use raw materials originating outside the state.

In the *Consolidated Edison* case the employer was almost completely dependent upon raw materials, supplies and equipment shipped to it from other States.

> *Consolidated Edison Co.* v. *NLRB*, 95 F. (2d) 390, 393 (C. C. A. 2d, 1938).
>
> Record in *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197 (1938) at pages 1364-1371.

In its decision this Court dismissed these vast purchases, holding instead that the jurisdiction of the Board was founded upon the necessity of the employer's unhampered operation to the function of interstate transportation facilities. *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197 (1938).

The Board's power does not extend to the removal of remote and indirect effects. If it did, every intrastate transaction involving interstate transportation by others would come within Federal control and thereby put an end to our Federal system. The local merchant referred to by the Second Circuit in the *Consolidated Edison* case [4] would fall under the Board's aegis. On his shelves one finds pineapple from Hawaii, fruit from California and Florida, potatoes from Idaho and Maine, spices from foreign lands, a host of other food products brought from every corner of the globe.

> "The authority of the Federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system".
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> *NLRB* v. *Jones & Laughlin Steel Corp., supra*, at page 30.

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[4] 95 F. (2d) at pages 393-394.

Because of improved methods of communications and transportation nearly everything we do in modern life has some effect on commerce. But if these "centripetal forces are * * * isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our Federal system".

Per Cardozo, J., in *Schechter Poultry Corporation* v. *United States,* 295 U. S. 495, 554 (1935).

Federal intervention in matters of local concern may be justified only where commerce is affected in a direct and substantial manner. Petitioner submits that its activities are without such effect.

Point II.

The enforcement by the court below of paragraph 1 (b) of the Board's order directed against surveillance constitutes a material departure from the course of judicial review under the Act as interpreted by this Court because it is based upon findings of fact made independently by the court below and not found by the Board. A significant Federal question requiring the exercise by this Court of its power of supervision is thus presented.

The court below sustained paragraph 1 (b) of the Board's order directed against surveillance by a course of judicial review directly contrary to that required by the Act as interpreted by this Court.

In *NLRB* v. *Waterman Steamship Corp.,* 309 U. S. 206 (1940) this Court warned that the Board has the exclusive power to find the facts. This Court also declared in *NLRB* v. *Link-Belt Co.,* 311 U. S. 584 (1941) that "Congress entrusted the Board, not the courts, with the power to draw inferences from the facts".

The review of the evidence of surveillance by the court below ignored the foregoing limitations upon the scope of judicial review.

In order to demonstrate this it is necessary to trace each step taken by the court below in its review of this phase of the case. The court below first reviewed the testimony of Alice Raymond, the private secretary of Lewis, petitioner's editorial director, to the effect that

> "• • • it was Lewis' habit, after Guild meetings, to write to Rochester; that the general nature of the letters was 'what went on at the meetings and what the Guild was planning'; that Miss Scott and Scannell were mentioned in the correspondence; and that the letters to Rochester were much more frequent before the contract with the Guild than afterwards" (R. 1315).

How did the court below regard this evidence? It stated that the testimony

> "shows no more than that the correspondence contained references to the activities of the Guild and two or three of its members" (R. 1315).

The court below admitted that (a) the reference to Miss Scott is not significant since she was retained with an increased salary (R. 1315); (b) the reference to Scannell "tends to justify Lewis' action in dismissing him, since it related not to union activity, but to his failure to comply with Lewis' instructions in the work he was given to do" (R. 1315); (c) the "reference to Wanhope is unexplained, except that Lewis regarded him as a 'red' " (R. 1315).

Yet the foregoing was the evidence upon which the Board found that petitioner had kept the Guild under surveillance in violation of Section 8 (1) of the Act.[5] Apparently at this

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[5] In its decision the Board said:

"The record does not disclose the method by which Lewis secured his information concerning the Guild which was the subject of his Monday report to 'Rochester'" (R. 1222).

point the court below was not satisfied that this evidence supported the Board's finding of surveillance.

But in any event the court below refused to sanction the conclusion of the Board that surveillance *ipso facto* violated the Act (R. 1315). Without passing directly upon this question the court below, after in effect rejecting the Board's findings, proceeded to arrive independently at two findings of fact not found by the Board in order to support the Board's finding of surveillance and to supply a factor essential to the causation that the surveillance interfered with Guild activity.

The court below found a preliminary fact based upon (a) "evidence that on the day following the Guild meetings Lewis was in possession of detailed information concerning what went on at the meetings and what the Guild was planning" (R. 1315) and (b) "further evidence (*not referred to by the Board*) that during a number of conferences Lewis assured employees that 'they [the employers] were well apprised of what was happening in the Guild'" (R. 1315). (Emphasis supplied.)

Apart from the objection that there is no support in the record for the court's statements, from the foregoing course of review nothing can be plainer than that the court below arrived at a finding of preliminary fact not found by the Board and based in part on evidence not even referred to by the Board. This finding of fact also involved inferences not drawn by the Board and drawn by the court below from a fact which the Board did not find. *NLRB* v. *Waterman Steamship Corp., supra,* and *NLRB* v. *Link-Belt Co., supra,* forbid such a clear departure from the course of judicial review contemplated by the Act.

But this is not all. The court below next stated:

> "Taken in conjunction with Lewis' failure to explain how he acquired his information, this evidence tends to

> show that he kept himself informed by some means of the Guild's plans, and this we think may be called surveillance." (R. 1315.)

In the light of the court's refusal to sanction the view that surveillance unaccompanied by coercion, interference or restraint is in violation of the Act, the foregoing evidence would merely establish that Lewis acquired knowledge. The court below supplied the missing link by making another finding of fact—this time an ultimate fact—as stated in the opinion:

> "In any case, the substantiated finding that Lewis later dismissed employees for their Guild activities supports the conclusion that the knowledge thereby acquired did actually interfere with union activity." (R. 1315.)

The Board found only that there was surveillance (R. 1223). It did not find that the surveillance interfered with Guild activity. The court below supplied this missing link itself by finding an ultimate fact to establish a causation not found by the Board but upon which the validity of paragraph 1 (b) of the Board's order depended.

In so doing the court below exercised a fact-finding power which Congress entrusted exclusively to the Board.

A significant Federal question requiring the exercise by this Court of its power of supervision is thus presented.

Point III.

The court below erroneously regarded as substantial evidence of discriminatory discharges inferences drawn from the failure of one person to testify where such inferences were relied upon to give vitality to circumstantial evidence otherwise regarded by the court as lacking in rational probative force. This unique question of judicial review should be passed upon by this Court.

The court below deemed "the real bone of contention in this case" to be the question of whether Lewis, petitioner's editorial director,

> "purposely availed himself of the opportunity to reduce his staff in order to relieve himself of the presence of certain officers and members of the Guild whose union activities he personally did not relish or approve" (R. 1312).

There was no direct evidence on this question. But the Board's conclusion that Lewis discriminated against Guild members (R. 1224-1228) was said by the court below to rest upon inferences drawn from circumstantial evidence described by the court in the following terms: oral statements of Lewis; his asserted familiarity with the activities of the Guild; his failure to testify; the excessive proportion of Guild members selected for dismissal; a rather casual appraisal of the relative merits of employees (R. 1312).

Upon close analysis of the opinion, it will be seen that in the view of the court below all of the inferences which were drawn from the circumstantial evidence hereinabove described came into being only because of Lewis' failure to testify. None of the circumstantial evidence mentioned by the court below had any separate legal significance. It was Lewis' failure to testify which was deemed by the court below to give vitality to the circumstantial evidence and to infuse into that evidence a rational probative force which the court felt was otherwise lacking.

Any doubt that this was the court's position is dispelled by the following paragraph from its opinion:

> "*If, in this state of the record, Lewis had gone on the witness stand and testified* that he had exercised the right to discharge Scannell, Wanhope, and Christman because he was able to retain other men who were their superiors in the work of the newspaper, or because

of any dereliction on their part in the discharge of their duties, or that in making his selections he had weighed the relative merits of those whom he retained and those whom he discharged and had based his selection on the ground of merit alone, *the case would have a different aspect. But since he refrained from testifying at all, we are unable to say that the factor of Guild activity, which the Board considered the real cause, can be said to be without support in the evidence.*" (Emphasis supplied.) (R. 1312.)

The foregoing paragraph establishes that the court below in reality held that the inferences which were drawn from the circumstantial evidence otherwise inert became substantial evidence merely by reason of Lewis' failure to testify.

Such inferences cannot satisfy the requirement of substantial evidence defined by this Court in *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229 (1938) as

> "* * * such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".

Since the court below considered all of the inferences from the circumstantial evidence to be dependent for their existence upon the inference from Lewis' failure to testify, such inferences could not constitute evidence

> "* * * to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury". *NLRB* v. *Columbian Enameling and Stamping Co.*, 306 U. S. 292, 300 (1939).

One need only read the part of the opinion of the court below dealing with the question of circumstantial evidence to see how the entire case was made to turn around Lewis' failure to testify. On virtually every other phase of the case the review of the evidence was favorable to the peti-

tioner's contention that there was no substantial evidence to support the Board's findings of fact. The only exception is surveillance, but it has already been shown that the Board's finding of surveillance was bolstered by a finding of preliminary fact improperly made by the court below itself and that the court below made another finding of ultimate fact to supply the link of interference with Guild activity essential to the enforcement of paragraph 1 (b) of the Board's order.

On every other phase of the evidence the court below found that there was no support for the Board's findings of fact. Lewis' oral statements alone were held to constitute proper expressions of opinion (R. 1311), and it was unequivocally held that his statements did not have the effect of coercing employees in the rights guaranteed by the Act (R. 1312). In the opinion it was twice stated that there was no evidence or finding of hostility on the part of any other executive of petitioner (R. 1312, 1317-1318).

But on the question of Lewis' bias, the court below, despite its forthright statement "that the case would have a different aspect" if Lewis had testified (R. 1312), was content to find substantial evidence in inferences that had their inception solely because of the failure of one person to go on the witness stand (R. 1313).

The fact that Section 10 (b) of the Act provides that in hearings before the Board or its agents "the rules of evidence prevailing in courts of law or equity shall not be controlling", cannot avail to dispense with the fundamental concepts of fairness, relevancy, probative force, and common sense. In the light of these standards mere inferences from failure to testify without support in other evidence of reasonable probative force cannot be deemed substantial evidence upon which the Board's order is required by the Act to rest. This unique question of judicial review should be passed upon by this Court.

The danger of relying exclusively upon mere inferences from failure to testify is further illustrated by the absence of substantial evidence to support the Board's findings that Scannell, Wanhope, and Christman were discharged because of discrimination against Guild members.

The court below held there was no substantial evidence to sustain the Board's finding that Lewis had coerced Guild employees (R. 1312). Without the aid of findings of fact which it made independently of the Board, the court felt that the testimony of Lewis' private secretary, Alice Raymond, did not establish surveillance (R. 1315). But on the issue of Lewis' bias against the three editorial employees herein involved the court below, as previously shown, regarded as substantial evidence of discrimination the inferences from Lewis' failure to testify.

The record conclusively establishes that there was no discrimination against Guild members (R. 867-868, 771-772, 836, 983, 1029, 1051, 1073, 1079). In the interest of brevity only a summary of the salient features is here given. The record shows that Scannell was an obstructionist who habitually failed to comply with instructions of his superior, Lewis (R. 691). His work was criticized by Lewis and by Hyde, the managing director (R. 407, 408, 430, 691). In its review of Miss Raymond's testimony the court below said that her recollection of the reference to Scannell in the letters she wrote "tends to justify Lewis' action in dismissing him, since it related not to union activity, but to his failure to comply with Lewis' instructions in the work he was given to do" (R. 1315).

The record shows that Wanhope lacked versatility and was uncooperative (R. 410, 523, 862). He admitted he was a one-type of story writer and that he could not write stories which required a light touch, which stories, in his

opinion, were "simply tripe" (R. 523). He further testified that if asked to handle such stories he would not do so (R. 523). Wanhope was adversely criticized by staff members among whom he created friction. Scannell testified that over a period of years there was constant friction between him and Wanhope; that he reported to Lewis that Wanhope "was deliberately trying to pile up overtime" (R. 409). Wanhope admitted that he used abusive language to fellow employees over the telephone and that there were constant complaints about it (R. 513).

The record shows that Christman's work was distinctly below average, sloppy, and inferior, and that in any reduction in staff he should have been among the first to go (R. 540, 988). Christman testified that his reason for joining the Guild originally was because he felt insecure in his position with petitioner (R. 541). But this feeling of insecurity existed long before he became a member of the Guild and could not have been attributable to any Guild activity since at that time he had engaged in none.

It should also be noted that Christman was the employee who had possession of the stenographic notes of Lewis' confidential secretary, Miss Raymond, and that he brought these notes to her and requested her to transcribe them (R. 694-695). Christman refused to reveal to Miss Raymond the manner in which he obtained the notes (R. 694). On this point the court below stated that "The manner in which her evidence was secured reflects no credit upon the Guild" (R. 1314).

Thus this Court is called upon to decide whether it is an unfair labor practice under the Act to discharge in good faith and on the basis of merit and fitness three editorial employees whose discharges were necessitated by petitioner's reduction of operations.

Point IV.

The order of the Board constitutes an infringement of the freedom of the press as guaranteed by the First Amendment to the Constitution of the United States by a particular form of abridgment not heretofore reviewed by this Court.

This Court has never had occasion to consider the particular form of abridgment of the constitutional guaranty of a free press presented by the record in this case.

No exegesis of the basic freedom of the press [6] and related freedom of speech [7] cases decided by this Court is necessary to demonstrate that the protection of the First Amendment extends to any form of legislative interference with the judgment of the publisher in the determination of the policies and contents of his publication and its dissemination.

In this case the Board as an agency of the Congress claimed the power to require petitioner to lay before it for review the reasons why one editorial employee was selected as against another (R. 1225).

Petitioner contended that by reason of the First Amendment the Board has no such power (R. 54-56, 66-67, 76, 85, 1173). On the issue of fact of whether the discharges in controversy here were discriminatory all the Board could constitutionally require under the circumstances of this case was a showing that these discharges were not made because of the Guild membership and activities of the editorial employees in question.

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[6] *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147 (1939).

[7] *De Jonge* v. *Oregon*, 299 U. S. 353 (1937); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Carlson* v. *California*, 310 U. S. 106 (1940). See also *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

Such a showing was made by overwhelming positive evidence in the record with respect of the following:

1. When faced with an unavoidable reduction of operations necessitating the discharge of more than 150 employees in all departments (R. 110, 1224), petitioner's publisher instructed department heads to retain persons best equipped to serve on the basis of fitness and merit (R. 821, 1100-1101).

2. This policy was applied in the editorial department where the discharges were governed wholly by considerations of fitness and merit (R. 54-55) and without regard to Guild affiliation and activities (R. 54, 55, 1100-1101).

3. The selections for discharge were approved by the publisher (R. 822, 1103).

4. Witnesses called by petitioner and by the Board fully established that Guild membership and activities never resulted in any act of discrimination by any of petitioner's executives, including Lewis (R. 822-823, 1100-1101, 867-868, 771-772, 836, 983, 1029, 1051, 1073, 1079).

5. There was no substantial evidence to the contrary.

Despite this state of the record the court below sustained the Board's findings that Scannell, Wanhope and Christman were discharged because of Guild activity (R. 1310-1313).

But as heretofore shown, there was no direct evidence on this question. As viewed by the court below the pivot on which the issue of discrimination—and in reality the entire case—turned was the inferences drawn from circumstantial evidence (R. 1312). All of these inferences came into being only because of the failure of Lewis, petitioner's editorial director, to testify concerning why he chose one editorial worker as against another. Without these inferences the

court below said "the case would have a different aspect" (R. 1312). Upon these inferences rested the conclusion of the court below that there was substantial evidence to support the Board's findings of discriminatory discharges.

Petitioner submits that the First Amendment precluded the Board from drawing unfavorable inferences from Lewis' failure to testify.

The question here is not the reasonableness of such inferences. It is a question of the existence of power to draw them. It would have been inconsistent with petitioner's claim of constitutional immunity from interference with its judgment as to the relative merits of particular editorial employees to have offered Lewis as a witness. Under such circumstances, silence cannot become evidence of any character. No such Federal question has even been presented to this Court for decision.[8]

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[8] In fact, the court below did not cite any controlling authority. It merely cited for comparison the four cases discussed below (R. 1313) which are clearly distinguishable.

In *Montgomery Ward and Company* v. *NLRB*, 107 F. (2d) 555 (C C. A. 7th, 1939), the assistant to the plant manager made speeches and held conferences with individual employees during a campaign to unionize the plant. These statements were held to manifest strong anti-union sentiment and an earnest effort and plan to prevent unionization. Hence they transgressed the permissible bounds of free expression by an employer of his views on unionization. The inference of discriminatory discharges was deduced largely from this evidence. Montgomery Ward did not challenge the Board's order as a violation of the First Amendment. In the instant case, the inferences were drawn from Lewis' failure to testify. The court below held that his statements were within the permissible bounds of free expression of opinion by an employer and were not coercive. The inference of discrimination was drawn from his failure to testify.

In *NLRB* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d, 1938) there was no contention that the First Amendment had been violated. In that case an employee of ten years standing, who was a picket during a strike, was the only employee the company refused work. No explanation for his discharge was given by the employer.

Nothing in *NLRB* v. *Mackay Company*, 304 U. S. 333 (1938), is even remotely related to the issues herein. Respondent did not contend that the Board's order violated the First Amendment and the court did not consider the question.

The court below misapprehended a vital point when it said that petitioner contended that "freedom of the press permits a publisher to withhold the basis of his selection of employees" (R. 1312) and that petitioner refused "to testify in denial of union discrimination and in frank explanation of the grounds for selection and dismissal of editorial workers" (R. 1313).

Petitioner at no time refused to reveal the basis or grounds for selection of its editorial employees. They are repeatedly disclosed in the record as fitness and merit and are corroborated by witnesses called by the petitioner and by the Board's own witnesses (R. 54-55, 821-822, 1100-1101, 1103). What petitioner refused to do was to account to the Board for the publisher's exercise of judgment that the individual editorial employees retained were superior to the individual employees discharged.

The First Amendment vouchsafes to the publisher the final responsibility for the selection and assignment to work of editorial employees deemed by him to be qualified by fitness and merit to effectuate the editorial policies of his newspaper. There is no yardstick by which the value of the services of an editorial employee can be gauged other than the judgment of the persons responsible for the publication of the newspaper. The value and effectiveness of the work of editorial employees depend upon such qualities as personality, ambition, imagination, creative ability, independence of mind and diverse and special talent. The fitness and merit of a particular editorial employee is exclusively a matter of appraisal of the individual (R. 55).

In *Interstate Circuit* v. *United States*, 306 U. S. 208 (1939), the constitutional guaranty of the First Amendment was not involved. The case concerned proof of a conspiracy in violation of the Sherman Anti-Trust Act among motion picture distributors who were charged with acting in concert to impose restrictions upon their licensees. Every one of the distributors failed to testify as to the alleged agreement and there was substantial evidence other than the inference from silence to support the concerted action.

If petitioner had acceded to the Board's claim of power to review the publisher's judgment in appraising the relative merits of particular individuals it would have surrendered and transferred to the Board the final responsibility for the editorial policies of its newspaper.

If the publisher must justify to the Board his individual choices of editorial employees, apart from a showing that union affiliation and activities were excluded from consideration, then a "pervasive threat" of censorship[9] inherent in the very existence of the asserted power to review will hang like a heavy pall over the editorial department of a newspaper. Behind every difference of judgment between the publisher and the Board affecting individual employees would lurk the threat of a charge of discrimination against union members despite a record replete with evidence to the contrary.

That this is no idle fear is demonstrated in this case by the fact that every matter concerning which Lewis could have been asked to testify in denial of union discrimination without violation of constitutional rights was fully covered by the testimony of witnesses called by petitioner and the Board.

The court below failed to distinguish *Associated Press* v. *NLRB*, 301 U. S. 103 (1937). In that case the Associated Press did not attack the finding of the Board that one Watson, an editorial employee, was discharged for Guild activities. Consequently this Court held that the Board had the power to enter its order.

By failing to present before the Board and the courts the question of the constitutional right of the publisher to discharge an editorial employee based upon criteria other than union activity, the Associated Press narrowed the issue to the power of the Board to order the reinstatement of Watson

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[9] Cf. *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940).

upon the basis of an unchallenged finding of fact that his Guild activity was the reason for his discharge.

No such issue is under review here. Unlike the *Associated Press* case here the Board and the court below were asked to deal "upon the basis of facts disclosed" and not "with nonexistent and assumed circumstances". Cf. 301 U. S., at page 132.

The court below misapplied the holding in the *Associated Press* case by ignoring the principles clearly announced therein that the Act does not compel the employment of anyone and that

> "The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees." (301 U. S., at page 132.)

In the *Associated Press* case there was no showing that the discharge of Watson fell within the area of the publisher's discretion in enforcing editorial policies of his own choosing. In the instant case such a showing was made at every stage of the proceeding. The record contains substantial evidence that Scannell, Wanhope and Christman were judged on the basis of merit and fitness and that their discharges were necessitated by an unavoidable reduction of operations of petitioner's newspaper, as hereinabove shown.

This Court should review the novel constitutional question thus presented.

Point V.

The proceedings, findings and order of the Board violate petitioner's substantial rights as guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States. This fundamental question of Constitutional right is presented under circumstances never before reviewed by this Court.

The court below failed adequately to discharge its ju dicial duty of passing upon a fundamental question of la presented by petitioner's contention that it had been denie a full and fair hearing as guaranteed by the due proces clause of the Fifth Amendment.

At every stage of the proceedings petitioner insisted tha it had been denied due process by being deprived of an im partial hearing (R. 51, 57, 68, 77, 218, 1173, 1207-1208 This contention was based upon the following:

A. *Circumstances prior to complaint and hearings.*

1. Prior to the issuance of the complaint and hearing thereon, officials of the Board were credited by Guild mem bers with having given assurances to the Guild of an ai tight case (Board Exhibit 86; Petitioner Exhibit 4). On witness testified that Wanhope had made a statement to th effect that the Board had said the Guild had an open-an shut case and could not lose (R. 956). Another witne testified that within a few weeks after the discontinuan of petitioner's morning and Sunday newspaper the Gui had announced that the Board had said the Guild had a open-and-shut case (R. 986).

2. These assurances must be read in the light of the si nificant fact that the Guild had withdrawn from the pr ceedings instituted before the New York State Departme of Labor wherein petitioner had agreed to be bound by t findings of the State Mediator (Board Exhibit 76, 80, 448).

B. *Circumstances during course of hearings.*

1. In its answer to the amended complaint petition alleged that the Board had disqualified itself from proceed ing by reason of its failure to observe due process (R. 6 69). When counsel for petitioner moved to dismiss for v

lation of due process, the Trial Examiner informed him that he would consult with the Board and that he would inform counsel for petitioner of "the position which the Board takes some time today" (R. 218).

2. During the course of the hearing before the Trial Examiner counsel for the Board said:

> "The Board says that the two companies have violated the National Labor Relations Act" (R. 162).

and

> "The Board's position is that both companies have violated the National Labor Relations Act" (R. 163).

3. The record shows that during the course of the hearings counsel for the Board stated that he wished to submit "an amended charge to conform to the amended complaint", saying:

> "I have not as yet drawn the amended charge, but I will.
>
> * * * * * * *
>
> "* * * That is an amended charge that the Guild is to file. It is amended in the record. I did not intend to make a formal amended complaint, but will do so if I am so directed." (R. 757.)

The foregoing reveals that before the amended complaint was served counsel for the Board considered that it was his function to act as agent of the Guild in filing amended charges upon the basis of which the complaint was amended.

C. *Circumstances during oral argument before the Board.*

1. In his Intermediate Report the Trial Examiner omitted all reference to the uncontradicted evidence in the record on the issue of due process. To this petitioner took exception (R. 1173, 1207-1208).

2. Counsel for petitioner called to the Board's attention the record evidence hereinbefore detailed and that counsel for the Board had done nothing to refute this evidence. Whereupon the Chairman of the Board asked counsel for petitioner whether he believed the Chairman or either of his two associates on the Board was guilty of making commitments to the Guild (R. 13, 1295).

3. Counsel for petitioner replied that it was unnecessary for him to answer that question, referring again at that point to the evidence in the record hereinabove detailed (R. 13-14, 1295).

4. Whereupon the Chairman of the Board again insisted upon an answer and when counsel for petitioner replied that in the light of the record it was not necessary to answer the Chairman said:

> "Mr. Hanson, you know that is sheer demagoguery for the benefit of the small audience to your rear." (R. 14, 1296.)

5. Counsel for petitioner had reserved a portion of his time for rebuttal and when opposing counsel had concluded his argument counsel for petitioner asked the Chairman of the Board how much time he had remaining. To this inquiry the Chairman replied:

> "You have four minutes if you think it will do you any good." (R. 14, 1296.)

The court below disposed of petitioner's contention on due process in the following language:

> "As to all of this, it is sufficient to say that there was no showing from which we can or should infer that either the trial examiner or the Board members had made statements showing prejudgment of the case. If any statements made by the prosecuting arm of the Board created the unfortunate impression that the case

was foreclosed before it was begun, this was the result of those provisions of the statute which combine in the same agency not only the power to investigate, initiate, and prosecute, but as well the power to hear and decide. But responsibility for such matters is with the legislature and not with us. What is complained of as later occurring in the argument, may reasonably be considered as having resulted from the implications of counsel's remarks, and we know of no rule of judicial conduct applicable either to court or board which requires silence in the face of an imputation of dishonorable conduct." (R. 1309-1310.)

The foregoing statement both misconceives the duty of the reviewing court and inaccurately characterizes petitioner's contentions for the following reasons:

1. The responsibility for due process ultimately rests upon the court and not upon the legislature. The very fact that the provisions of the statute telescope into a single agency prosecuting and judicial functions imposes upon the court an even greater responsibility to scrutinize the record for material departures from the historical and traditional processes which are of the essence of fair adjudication.[10]

Questions of constitutional right are always open to examination by the court.[11] There must be fairness in substance, tendency and effect, not mere formal fairness. Assuming that the commingling of the prosecuting and judicial functions in the same agency is attributable to the legislature, it does not follow that the court can disclaim responsibility when the results of such a combination of functions are inimical to the safeguard of a full and fair hearing. Upon the claim that petitioner has been denied due process the court has power to consider any evidence

[10] Report of Attorney General's Committee on Administrative Procedure in Government Agencies, Senate Document No. 8, 77th Cong., 1st Sess. (1941) 209.

[11] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47 (1937).

adduced before it which is relevant and material to the Board's procedural processes by which it arrives at its findings of fact.[12]

Since the court below disavowed such responsibility petitioner has no assurance that the circumstances set forth in the record and upon which its contention of violation of due process was based were given the scrutiny to which they were entitled.

The Board cannot arrogate to itself the right to sit in judgment on its own conduct in building up a record irrespective of whether the record was made with due regard for the constitutional rights of petitioner. The processes by which a decision is reached must not offend substantial rights to which petitioner is entitled under the Constitution.

[12] On the issue of constitutional right the decisions of this Court in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 51, 52 (1936) and *Morgan* v. *United States*, 298 U. S. 468, 480, 481 (1936) establish that the court has the power to make an independent judicial review to guarantee the "inexorable safeguard" of a fair and full hearing. See also *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 443 (1930), citing *Louisville & N. R. Co.* v. *United States*, 245 U. S. 463, 466 (1918). If *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573 (1940) is regarded as adopting a different view, the doctrine requires clarification by this Court.

In the court below petitioner sought to set forth in its brief numerous specific examples of departure in the Board's procedure from the accepted notions of due process taken from the Verbatim Record of the Proceedings of the House Committee Investigating the Labor Board and Wagner Act. The court below ordered this matter stricken from petitioner's brief (R. 1275) on motion of the Board (R. 1245-1251, 1267-1268) to which petitioner filed oppositions on the authority of the cases hereinabove cited in this note (R. 1251-1258, 1261-1267, 1268-1274). Petitioner contended that the court could take judicial notice of the proceedings of a public investigatory agency to assist it in making an independent judicial review to determine whether the procedures under the Act fulfilled the requirements of due process (R. 1270-1271). All of these matters were raised prior to the oral argument before the court below. Cf. *NLRB* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241 (1939); *Inland Steel Co.* v. *NLRB*, 109 F. (2d) 9 (C. C. A. 7th, 1940). Any administrative procedure which has the capacity and tendency to subject litigants to undue risks lacks what Mr. Chief Justice Hughes termed "the rudimentary requirements of fair play". *Morgan* v. *United States*, 304 U. S. 1, 15 (1938).

2. The court below in part assumed that the statements relied upon by petitioner to show prejudgment were made by "the prosecuting arm of the Board" (R. 1309). Petitioner referred to statements made before the complaint and hearings (Board Exhibit 86; Petitioner Exhibit 4; R. 956, 986) and during the hearings (R. 162, 163, 218) but at neither time did petitioner have any way of knowing what officials of the agency were credited with the statements. Petitioner is still uninformed. The statements themselves were credited to the Board. They stand uncontradicted and unchallenged in the record.

3. The court below felt that the comments of the Chairman of the Board during the argument before it, as hereinabove shown, were provoked by the retort of counsel for petitioner that it was unnecessary to answer the question of whether he believed the Chairman or either of his two associates on the Board had made commitments to the Guild (R. 1309-1310).

There is no basis in the record or in what transpired during the oral argument before the Board to justify the conclusion of the court below that the remarks of petitioner's counsel carried an imputation of dishonorable conduct.

In the light of the record counsel for petitioner would have been derelict in his duty had he failed to call the attention of the Board to matters that stood unchallenged in the record and to which the Trial Examiner made no reference in his report to the Board (R. 1173, 1207-1208). Having discharged his duty in that respect counsel for petitioner felt that the record spoke for itself. An answer to the Chairman's questions would only have served to convert an argument based upon the record into an *argumentum ad hominem* the Chairman was apparently seeking to provoke.

A charge of prejudgment is a charge of bias. Bias may be attributable to various factors. It may stem from the structure of the statute creating the agency or from the internal organization and administration of the agency or from the state of mind of the personnel of the agency or a combination of the foregoing factors. Charges of bias and prejudice have been made in other cases before the Board and were sustained by the courts.[13] In this case the record shows that officials of the Board opened themselves to the charge that they conceived their role to be that of partisans. A statute which consolidates in the same agency the functions of investigation, prosecution and decision itself creates the very processes by which freedom of quasi-judicial officers from bias or partisan viewpoints is likely to be impaired. Uncontradicted evidence in the record shows that under the circumstances of this case petitioner had more than reasonable grounds to believe that it had been deprived of the protection of due process.

Certainly a charge of bias should not be characterized as an imputation of dishonorable conduct. The system of adjudication sanctioned by the statute herein may well be so self-defeating of impartial judgment in the controversial field of labor as to lead officials sincerely to believe that it is their duty to play the role of the advocate of the employees. Lack of separation of functions increases the danger that the system may germinate this conviction in the minds of officials who were intended to perform quasi-judicial functions.[14] The blurring of the lines of division of functions itself tends to foster a state of mind in those who do the judging incompatible with dispassionateness.

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[13] *Inland Steel Co.* v. *NLRB*, 109 F. (2d) 9 (C. C. A. 7th, 1940); *Montgomery Ward & Co.* v. *NLRB*, 103 F. (2d) 147 (C. C. A. 8th, 1939).

[14] Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, *op. cit. supra*, 203 *et seq.* Contemporary criticisms of the combination of functions in one agency are too well known to require description herein.

A charge of prejudice properly raises the constitutional issue that the Board's practices are repugnant to due process. That is the heart of petitioner's contention which the record supports by substantial evidence.

The innuendoes attributed by the court below to the remarks of petitioner's counsel are wholly unfounded. No reference was made to the affidavits in the record of persons who were present during oral argument before the Board which show that the Chairman displayed anger and feeling when he first addressed his questions to petitioner's counsel (R. 1295, 1296, 1300); that his manner was unjudicial and hostile (R. 1296, 1298, 1299, 1300); and that he spoke with a smirk (R. 1300). If any innuendoes are to be attached they cling to the statements of the Chairman of the Board to which counsel for petitioner then and there objected because of the inference and implications as well as the bare fact of the statements (R. 14, 1296).

This Court should review the fundamental question of constitutional right thus presented under circumstances never before considered by this Court.

Point VI.

Paragraph 1 (c) of the Board's order as modified by the court below is in conflict with the principles announced by this Court in NLRB v. Express Publishing Company.[15] The grave uncertainties created by the vague contours of the language of the paragraph present an important question which should be clarified by this Court in the interest of litigants who otherwise will be exposed to undue risks of contempt proceedings.

If this Court were to affirm the judicial review of the Board's findings by the court below, then an important

[15] No. 442 this Term, decided March 3, 1941.

question is presented concerning the scope of paragraph 1 (c) of the order as modified by the court below.

In its original decree the court below eliminated paragraph 1 (c) of the Board's order on the ground that there was no evidence of any interference, restraint or coercion other than discriminatory discharges and surveillance against which paragraphs 1 (a) and 1 (b) of the order are directed and which the court below sustained (R. 1331-1333).

Subsequently, upon petition of the Board for rehearing on the sole ground that the deletion of paragraph 1 (c) was error (R. 1334-1343) the court below restored the said paragraph (R. 1345-1346).

Thereafter this Court in *NLRB* v. *Express Publishing Co.*, No. 442, this Term, decided March 3, 1941, modified a paragraph of the Board's order originally expressed in language identical to paragraph 1 (c) herein. Upon request of the court below memoranda were filed by both parties concerning the pertinence of the *Express Publishing Company* decision to the present case (R. 1346-1348, 1348-1354). In its final decree the court below modified paragraph 1 (c) to read as follows:

> "In any manner interfering with the administration of the Guild or its membership" (R. 1358).

On the assumption that this Court ultimately approves the review of the evidence by the court below, it is submitted that paragraph 1 (c) as modified is not supported by the Board's findings and thus fails to conform to the principles announced by this Court in the *Express Publishing Company* case.

That case lays down the general principle that the order of the Board cannot restrain practices unrelated to and not forseeable from the past conduct of the employer concerning which the Board has made findings.

The only practices with respect to which the Board's findings were upheld by the court below are discriminatory discharges in violation of Section 8 (3) and surveillance in violation of Section 8 (1) of the Act (R. 1310-1315, 1345, 1357). If these findings are sustained by this Court, then the language of paragraphs 1 (a) and 1 (b) of the order (R. 1331-1332) would be adequate to restrain these practices and to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the petitioner in the past. This completely fulfills the purpose of an injunctive order as delimited by this Court.

If sustained by this Court, paragraph 1 (a) exhausts every persuasive resemblance to that which petitioner was found to have committed in the past and is directed against every danger of commission in the future which is to be anticipated from the past conduct found. In broad terms it encompasses discouraging membership in the Guild or any other labor organization of petitioner's employees by discharge or refusal to reinstate any of them or *in any other manner* discriminating in the hire or tenure of employment or any other term or condition of employment of petitioner's employees (R. 1331).

In equally broad terms paragraph 1 (b) orders desistance from *in any manner* exercising surveillance over the meetings or meeting places of the Guild or the union activities of its employees (R. 1332).

In the event that both of the foregoing paragraphs are finally upheld, it is apparent that the language would be adequate to prevent the order from being "evaded by indirections or formal observances".

There is no justification under such circumstances for any additional injunctive restraint. If the Board's findings are ultimately upheld, every sanction which the Board as

the fact-finding agency could claim power to include in its order as essential to the protection of the Guild and relevant to the Board's finding is embraced within paragraphs 1 (a) and 1 (b).

Paragraph 1 (c) is directed against a new violation unlike and unrelated to those with which petitioner was charged or found to have been engaged. It subjects petitioner to the peril of contempt proceedings which will hang over petitioner's head like the proverbial sword of Damocles.

Why this is so becomes apparent in the light of the judicial review of the Board's findings. In the words of the court below "the real bone of contention" was whether Lewis, petitioner's editorial director, was motivated by animosity toward the Guild in selecting Guild members for discharge (R. 1312). The court below stressed the fact that the Board has placed upon Lewis the sole responsibility for discrimination against Guild members and that there was no evidence of hostility on the part of any other executive of petitioner (R. 1312, 1317-1318). All of the unfavorable inferences drawn from circumstantial evidence of discriminatory discharges were deemed by the court below to be lifeless except for Lewis' failure to testify. Were it not for Lewis' silence the court below said "the case would have a different aspect" (R. 1312). The only other practice found to be in violation of the Act is surveillance (R. 1315).

Assuming arguendo that this judicial review is approved by this Court, in this limited aspect of the case there is no tenable theory by which paragraph 1 (c) can be viewed as within the permissible area of related acts. It is manifest that the court below did not intend paragraph 1 (c) to be construed as interference with the administration of the Guild or its membership by the means enjoined in paragraph 1 (a) and (b) of the order. It expressly stated that the conduct forbidden is interfering with the administra-

tion of the Guild and discrimination against employees in regard to tenure of employment because of their membership in the Guild (R. 1357).

Nevertheless, the court below took the view that an order of desistance from in any manner interfering with the administration of the Guild or its membership fell within the related conduct of a general nature in which petitioner was found to have engaged.

Accordingly, the court below must have meant to broaden the practice of surveillance to include new and different acts, *viz*: interference in any manner with the administration of the Guild or its membership.

The untenability of this breadth of the order is laid bare by two admissions of the court below. (1) It was conceded that the present case has a different complexion than *NLRB* v. *Fansteel Corp.*, 306 U. S. 240 (1939) (R. 1357), which this Court said "disclosed persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board or the court found or could have found the threat of continuing and varying efforts to attain the same end in the future". (2) The court below admitted that the forbidden conduct in this case did not include in its scope the practices denounced by Section 8 (2), (4) and (5) of the Act, except interference with the administration of a labor organization (R. 1357).

The definition and classification of the unfair labor practices in the Act clearly refute this latter exception. Interference with the administration of any labor organization is specifically prohibited in Section 8 (2) but petitioner was not charged with or found to be violating this provision of the Act.

If the findings in this case of violation of Section 8 (1) by surveillance and 8 (1) and (3) by discriminatory discharges can be related to interference with the administration of the

Guild or its membership embraced within Section 8 (2), then the court below has but revived in another guise the catch-all, blanket provision condemned by this Court in the *Express Publishing Company* case. A mere glance at Sections 7 and 8 of the Act discloses that paragraph 1 (c) in effect virtually orders desistance from any unfair labor practice in violation of the Act.

By the terms of paragraph 1 (c) each and every subdivision of Section 8 might be so interpreted as to subject petitioner to the peril of a contempt proceeding based upon an allegation, however remote, of some form of interference with the administration of the Guild or its membership. The Annual Reports of the Board eloquently testify to the myriad methods which might conceivably be given the aspect of interference with the administration of a union.[16]

From the foregoing it is evident that in the circumstances of this case, assuming that the Board's findings are affirmed by this Court, the only related acts of interference with the Guild are necessarily embraced within the terms of paragraphs 1 (a) and (b) of the order directed against the practices of surveillance and discriminatory discharges. It should not go unnoticed that the court below held that the oral statements of Lewis, around whose conduct the whole case was said to turn, fell within the allowable area of free speech and were not coercive or in violation of the Act. Said the court:

> "* * * nothing that Lewis is quoted as having said, nor the surrounding circumstances, conveys the idea that the employees had anything to fear because of their union activities" (R. 1312).

Indeed, the reason first given by the court below for the elimination of paragraph 1 (c) in its original broad form

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[16] E.g., Third Annual Report, pp. 51-80; Fourth Annual Report pp. 57-73; Fifth Annual Report, pp. 32-53.

was that there was no evidence of coercion, restraint or interference other than surveillance and discriminatory discharges (R. 1319). Yet in the attempt to apply the principles of the *Express Publishing Company* case the court below modified paragraph 1 (c) in a manner which revives the same unwarranted blanket provision in different phraseology.

In view of the grave uncertainties created by the vague contours of the language of paragraph 1 (c), if the Board's findings were to be sustained by this Court, an important question is presented for clarification by this Court of the applicability of the principles announced in the *Express Publishing Company* case. This question of the administration of the Act should be reviewed by this Court in the interest of litigants who otherwise will be exposed to undue risks of a summons for contempt.

III.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

ELISHA HANSON,
Attorney for Petitioner.

APPENDIX A.

The record herein contains the following information with respect to the circulations, based on a representative period, of newspapers affiliated with the Gannett Company:

Newspaper	Daily Average Circulation	Number of Copies Sent Outside State of Publication
The Beacon News	3,100	10* Board Exhibit 35
The Danville Commercial-News	28,144	5,437* Board Exhibit 42
Elmira Star-Gazette	26,433	4,400 Board Exhibit 37
Elmira Advertiser	6,562	500 Board Exhibit 37
The Hartford Times	62,933	629* Board Exhibit 36
Ithaca Journal-News	8,458	142* Board Exhibit 38
The Malone Evening Telegram	4,587	63 Board Exhibit 39
Massena Observer	2,550	121* Board Exhibit 41
The Newburgh News	12,264	81* Board Exhibit 40
The Ogdensburg Journal	5,113	61* Board Exhibit 41
Plainfield Courier-News	13,770	329* Board Exhibit 43
Rochester Democrat & Chronicle	81,239	406* R. 198
Rochester Times-Union	82,208	206* R. 198
The Saratogian	9,650	97* Board Exhibit 44
Utica Daily Press	20,707	103* Board Exhibit 45
Utica Observer-Dispatch	34,790	87* Board Exhibit 45
Total Circulation	402,508	
Total out-of-state circulation		12,672

The Danville Commercial-News, the Elmira Star-Gazette, the Elmira Advertiser, and the Massena Observer are published in cities within 10 miles from state lines. If these newspapers are omitted from the calculation, the figures become 338,819 total circulation and 2,214 (less than ⅔ of 1 per cent) out-of-state circulation.

* The figures marked by an asterisk are computed from the percentages given in the exhibits.

APPENDIX B.

Statutory and Constitutional Provisions Involved.

Constitutional Provisions Involved.

Article I, Section 8 of the Constitution of the United States provides that:

"The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *."

The First Amendment to the Constitution of the United States provides that:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution of the United States provides that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutory Provisions Involved.

The pertinent provisions of the National Labor Relations Act (49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151 *et seq.*) are as follows:

Sec. 2. When used in this Act—

* * * * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of

commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

* * * * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through rerpesentatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargain unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * * * *

Sec. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that

any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

* * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before

the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon

which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1046

THE PRESS CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion and supplemental opinions of the court below (R. 1307–1329, 1345–1346, 1354–1357) are not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1211–1232) are reported in 13 N. L. R. B. 630.

JURISDICTION

The supplemental decree of the court below (R. 1358–1359) was entered on March 24, 1941. The petition for a writ of certiorari was filed on May 12,

1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Board.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Act is applicable to petitioner, a newspaper publisher which receives daily from sources outside the State material for publication, prepares news reports for transmission to newspapers in other States, and receives in interstate commerce substantial quantities of the supplies necessary in publishing its newspaper.

2. Whether there is substantial evidence to support the Board's findings that petitioner discriminatorily discharged three of its employees in violation of Section 8 (1) and (3) of the Act.

3. Whether the court below departed from established principles of review under the Act (a) by supplying essential findings which the Board failed to make; (b) by referring, in support of a particular finding of the Board, to evidence not specifically mentioned in the Board's decision; or (c) by holding that the employer's failure to offer testimony by its official who selected the employees for discharge was a relevant consideration in determining whether they were discharged because of union activities.

4. Whether the Board's refusal to accept as conclusive petitioner's bare assertion that it had discharged the employees upon the basis of "fitness and merit" infringed the freedom of press guaranteed to petitioner by the First Amendment.

5. Whether the Board prejudged the case and was biased against petitioner.

6. Whether the decree requiring petitioner to cease and desist from "in any way interfering with the administration of the [Tri-City Newspaper] Guild or its members," which the court substituted for the Board's general cease and desist order, is too broad.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix to the petition (pp. 61–66).

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 1211–1232). The pertinent facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

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[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence. We omit from the statement the Board's findings that by reason of its active control over petitioner's labor and other policies the Gannett Company was an "employer" of the employees involved within the meaning of Section 2 (2) of the Act (R. 1214–1217) and the findings that Ray Mowers was discriminated

Petitioner is a newspaper publisher at Albany, New York (R. 1214; 52). During the several months prior to the hearing the extra-state circulation of petitioner's newspapers varied between 1 and 3 percent of the total circulation, which approximated 50,000 copies daily (R. 1217; 107). In the first 7 months of 1937 more than 90 percent by value of the 5,870,000 pounds of newsprint paper used by petitioner came to its plant in foreign and interstate commerce (R. 1218; 102–104). During the same period petitioner received 100,000 pounds of ink valued at $3,000 from without the state (*ibid.*). Petitioner receives from and supplies to the Associated Press news reports which are transmitted over the interstate wires of that organization (R. 1218; 138, 140–141, 144, 169–175, 176). And substantial quantities of the syndicated articles and comic strips used by petitioner are sent to it from points in other states (R. 1218; 118, Bd. Exhs. 23A, 24A, 25A). The Board found that unfair labor practices by petitioner tend to lead to labor disputes burdening and obstructing commerce (R. 1228).

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against in violation of Section 8 (3) (R. 1227–1228). The court below set aside the entire order against the Gannett Company (R. 1316–1319, 1358), and likewise set aside the reinstatement and back-pay order as to Mowers (R. 1313–1314, 1358). While we believe these modifications to be erroneous, we do not regard them as raising questions of sufficient importance, in the circumstances of this case, to warrant a petition for certiorari on behalf of the Board.

During 1936 and early 1937 petitioner engaged in collective bargaining with the Tri-City Newspaper Guild, a labor organization representing its employees; the parties frequently disagreed and on one occasion the Guild accused petitioner of lack of good faith and threatened to call a strike (R. 1219–1220; 279–281, 286, 303–304, 309, 310, 312, 313–320, 322–323, 325, 458, 464–465, 467, Bd. Exhs. 61, 63, 73). Editorial Director Lewis, the central figure in all of petitioner's unfair labor practices, was avowedly hostile to the Guild:[2] he repeatedly stated that he could not run an editorial room with the Guild present, compared its members to hod carriers rather than professional men, referred to them as "Guild rats," claimed that "the God-damned labor union is wrecking this newspaper" and stated that petitioner was cutting his funds because of the Guild (R. 1221; 382, 429, 436–439, 508, 510, 548, 585, 589, 591, 628, 688–689, 708, 736). The Board found that by Lewis' statements petitioner interfered with, restrained and coerced its employees in the exercise of their rights of self-

[2] Petitioner in effect admitted this hostility. After the Guild passed a strike vote in February 1937, Cruickshank, the secretary of both petitioner and the Gannett Company, promised that the intimidation with which the Guild charged Lewis would cease, and designated Publisher McDonald to act as petitioner's bargaining representative in place of Lewis (R. 184–191, 320, 322, 323, 325, 328–330, 355, 712, 1101–1102, Bd. Exh. 65, see R. 1220).

organization and collective bargaining (R. 1221, 1230).

On the mornings after Guild meetings Lewis would dictate letters to petitioner's principal office at Rochester describing what transpired at the meetings (R. 1221–1222; 688–689). The Board rejected petitioner's contention (see R. 834, 1003, 1081, 1083–1084) that Lewis obtained this information by overhearing casual office conversation and drew the inference from the prompt and detailed nature of his reports, that Lewis obtained his information through espionage and surveillance (R. 1222–1223). The Board specifically found that by keeping Guild meetings and the activities of Guild members under suveillance petitioner interfered with, restrained, and coerced its employees in their exercise of the rights guaranteed in Section 7 of the Act (R. 1223).

In June 1937 petitioner entered into an agreement with a rival publisher providing that petitioner cease publication of its morning and Sunday newspaper in return for the rival's abandonment of the evening field (R. 1223; 1085, 1098, 2361). To effect the reduction of personnel thus made possible, petitioner's department heads were instructed to "select an adequate staff from the people best qualified to serve their needs" (R. 1223; 1100–1101). Lewis, whom petitioner had replaced as its representative in dealing with the Guild because of his hostility toward that organization and

unionism in general (*supra*, p. 5), made the selection of editorial employees to be eliminated (R. 1223–1224; 352, 1103–1104, 1106). Of some 74 editorial employees, 29 were dismissed, 27 being Guild members, including 6 officers; 11 of the 45 retained were not members of the Guild (R. 1223; 71, 72, 337, 351–352, 445–446, 1104). The Board found that Austin J. Scannell (R. 1225–1226; 362, 367–369, 371, 375–377, 402, 404–405, 728), John Wanhope (R. 1226; 445, 494, 497–507, 620, 690, 741) and Henry E. Christman (R. 1226–1227; 273, 280, 286, 362, 533–535, 537–538, 547, 549, 711–713, 849, 890–891) were selected by Lewis for discharge because of their union membership and activity and that Lewis discriminatorily demoted Ray A. Mowers, thereby inducing that employee to resign (R. 1227–1228; 430, 546, 629, 630, 633, 636, 643). The Board found that petitioner had discriminated against these four employees in violation of Section 8 (3) and (1) of the Act (R. 1228, 1230).

The Board ordered petitioner to cease and desist from its unfair labor practices, to reinstate with back pay the employees illegally discriminated against, and to post notices (R. 1230–1231). Thereafter, petitioner and the Gannett Company filed separate petitions in the court below to review and set aside the Board's order (R. 1–22, 23–30). The Board answered and requested full enforcement of its order against both companies (R. 31–43). On December 9, 1940, the court below

handed down its opinion (R. 1307–1319) sustaining the Board's ultimate findings that petitioner had violated Section 8 (1) and (3) of the Act and entered a decree (R. 1331–1333) enforcing against petitioner the order as issued by the Board with certain exceptions not material here.[3] Thereafter, the Board filed a petition for rehearing confined to the single question whether the court had erred in setting aside paragraph 1 (c) of the Board's order, the general cease and desist provision (R. 1334–1335). On February 14, 1941, the court entered an order amending its decree so as to reinstate paragraph 1 (c) and denying the petition for rehearing (R. 1345–1346). On March 6, 1941, after the decision of this Court in *National Labor Relations Board* v. *Express Publishing Co.*, No. 442, this Term, petitioner filed a petition for modification of the decree (R. 1346–1348). On March 24, 1941, the court, Mr. Justice Rutledge dissenting (R. 1359–1360), entered an order modifying its decree by substituting for the general cease and desist provision one requiring petitioner to cease and desist from "in any manner interfering with the administration of the Guild or its membership" (R. 1354–1359).

ARGUMENT

1. Petitioner asserts (Pet. 7–9, 23–31) that a novel and important question is presented con-

[3] Mr. Justice Rutledge dissented from each of the modifications except one (R. 1230–1231).

cerning the application of the National Labor Relations Act to a "purely local business." However, the undisputed findings (*supra,* pp. 3–4) concerning the nature and extent of petitioner's dependence upon interstate commerce both for material published in its newspaper and for supplies used in the manufacture thereof, show plainly that petitioner's enterprise differs in no significant respect from those to which the Act has repeatedly and uniformly been held to apply.[4]

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[4] On the daily interstate transmission of news items to and from petitioner and petitioner's daily receipt of other material for publication, see *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128; *National Labor Relations Board* v. *Express Publishing Co.*, 111 F. (2d) 588 (C. C. A. 5), modified and affirmed, No. 442, this Term, decided March 3, 1941; *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4); *National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658 (C. C. A. 9); *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465 (C. C. A. 9). On the sufficiency of petitioner's receipt of substantial supplies from without the state to base the Board's jurisdiction, see *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board*, 101 F. (2d) 841, 843 (C. C. A. 4), reversed on other grounds, 308 U. S. 241; *Consumers Power Co.* v. *National Labor Relations Board*, 113 F. (2d) 38, 40 (C. C. A. 6); *National Labor Relations Board* v. *Sunshine Mining Company*, 110 F. (2d) 780, 784 (C. C. A. 9); *Southern Colorado Power Co.* v. *National Labor Relations Board*, 111 F. (2d) 539, 543 (C. C. A. 10). There are no contrary decisions under the Act.

2. Petitioner contends (Pet. 9–10, 31–34) that the Court of Appeals departed from the principles of review established under the Act by supplying a necessary finding, which the Board failed to make, that through its surveillance petitioner interfered with its employees' union activities. But the Board expressly found that through its surveillance petitioner "interfered with, restrained and coerced [its] employees in the exercise of the rights guaranteed in Section 7 of the Act" (R. 1223).[5]

Petitioner also objects (Pet. 10, 33) that in sustaining this finding of the Board, the court referred to two items of evidence which the Board failed to mention in its decision. This argument assumes as a premise that the Board is required to recite in its decision every item of evidence upon which a particular finding is rested, at the pain of having evidence not so recited excluded from consideration upon review. But see *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 114 F. (2d) 849, 854 (C. C. A. 7), certiorari denied, No. 615, this Term, January 13, 1941. Compare

[5] The Board also found, in connection with petitioner's illegal discrimination against Guild members in selecting employees for discharge, that "by reason of his surveillance of Guild activities, Lewis was thoroughly acquainted, not only with the Guild membership, but also with the degree of participation of the individual members and their relative importance in the affairs of the organization" (R. 1224).

Helvering v. *Gowran*, 302 U. S. 238, 245–246; *Helvering* v. *Rankin*, 295 U. S. 123, 132–133.[6] In any event, the Board, in finding that Lewis engaged in surveillance, did rely upon the facts that Lewis usually had his information on the day following union meetings and that the information was detailed in nature (R. 1222–1223). And the Board also referred to evidence that at a conference with one of the employees Lewis stated that he knew of the employee's union membership (R. 1221).

3. Petitioner contends (Pet. 11–12, 34–39) that a "unique question of judicial review" under the Act is presented by the fact that the Board and the court gave weight to the failure of Editorial Director Lewis to testify concerning the grounds upon which he selected the employees for discharge. Contrary to petitioner's assertion (Pet. 38), neither the Board nor the court regarded the absence of Lewis' testimony as the sole basis for the findings of illegal discrimination. The Board stated at length the evidence from which it inferred

[6] In *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, this Court, in sustaining the Board's finding that the schedule of the "S. S. Fairland" had been altered by the company with knowledge that the crew had shifted their union affiliation, stated that "The 'Fairland' is equipped with radio" (at p. 221). This fact had not been mentioned in the Board's decision, but it was plainly relevant to the question whether the Board's finding of knowledge had the requisite evidentiary support. Such instances are of frequent occurrence under the Act. See, e. g., *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584.

that Lewis had acted upon an anti-union basis (R. 1224–1228).[7] And the court, in referring to Lewis' failure to testify, did no more than to hold that the evidence upon which the Board's findings rested was substantial in the absence of contravening proof (R. 1312). This holding was neither novel nor improper. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 225–226.[8]

The further question (see Pet. 36–39) whether the Board's findings of illegal discrimination is supported by substantial evidence plainly does not call for additional review; the evidence summa-

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[7] One of the circumstances which the Board found persuasive is, as stated by the Board, the fact that "although the duty of selecting the restricted staff devolved on Lewis alone, and he alone was in a position to testify as to the basis upon which his selection was made, he was not offered as a witness and the natural inference to be drawn from his known bias against the Guild and the excessive proportion of Guild members selected for dismissal was allowed to stand without contradiction" (R. 1224–1225).

[8] See also *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 866 (C. C. A. 2), certiorari denied, 304 U. S. 576; *Agwilines, Inc.*, v. *National Labor Relations Board*, 87 F. (2d) 146, 152 (C. C. A. 5); *National Labor Relations Board* v. *Kentucky Fire Brick Co.*, 99 F. (2d) 89, 92 (C. C. A. 6); *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678, 681 (C. C. A. 6), certiorari denied, 308 U. S. 568; *National Labor Relations Board* v. *Bachelder*, decided March 13, 1941 (C. C. A. 7); *Montgomery Ward & Co., Inc.*, v. *National Labor Relations Board*, 107 F. (2d) 555, 559 (C. C. A. 7); *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49, 53 (C. C. A. 8); *North Whittier Heights Citrus Assn.* v. *National Labor Relations Board*, 109 F. (2d) 76, 78–79 (C. C. A. 9), certiorari denied, 310 U. S. 632.

rized in the Statement (*supra*, pp. 5–7) affords abundant support for the challenged findings.

4. Petitioner contends (Pet. 13–14, 40–45) that the Board infringed the freedom of press guaranteed by the First Amendment by finding that it had discharged four employees in violation of Section 8 (3) and (1) of the Act. Petitioner does not dispute that the publisher of a newspaper has no special immunity from application of the Act, no "special privilege to invade the rights and liberties of others." *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, 132–133. It contends that, in enforcing a valid regulation of its business, the Board was without power under the Constitution to go behind the defense that "fitness and merit" was the basis of selection of employees for discharge. But if the Board may not inquire into the elements considered under these vague criteria and must substitute a bare profession of innocence for factual investigation, petitioner is in fact immune from Section 8 (3) of the Act. The validity of the regulation plainly extends to an inquiry essential to its practical operation.

5. Petitioner contends (Pet. 15–17, 45–53) that the Court of Appeals should have set aside the Board's order for the reason that the Board was biased against petitioner and prejudged the issues.

(a) To support its claim of prejudgment, petitioner relies upon an article in the Guild "Bulletin" of September 5, 1937 (Pet. Exh. 4; see Bd.

Exh. 86) which contained statements that the Board would soon set a hearing date in this proceeding, that the case would be tried by a Board attorney, that Messrs. Isserman and DeGraff would represent the Guild, and that "counsel says it's airtight." There is nothing to indicate that this does not refer to Guild counsel. Petitioner also refers to testimony that at a Guild meeting Wanhope, an employee, announced that "the N. L. R. B. * * * said the Guild had an open and shut case" (R. 956, 986). The Board cannot be held answerable for enthusiastic statements of Guild members, probably based upon information that administrative officials of the Board had, after preliminary investigation of the facts by the Second Regional Office in accordance with the Board's practice, authorized issuance of the complaint. Fales, the president of the Guild (R. 273), flatly denied that any assurance or representations were made by the Board's representatives (R. 490–491).[9]

Petitioner's remaining proof of "prejudgment" (Pet. 47) is based upon the fact that during a colloquy between counsel at the hearing in regard to the position taken in the complaint that both petitioner and the Gannett Company were proper par-

[9] To bolster the inferences which it seeks to draw from this evidence, petitioner refers to "the significant fact" that the Guild withdrew from proceedings instituted by it before the New York State Department of Labor (Pet. 46). That

ties respondent, Board counsel, in stating the theory of the complaint that both companies were equally answerable under the Act for whatever unfair labor practices had occurred stated that "The Board's position is that both companies have violated the National Labor Relations Act" (R. 162, 163).[10] Plainly, the inference (that "the Board" had prejudged the case) which petitioner seeks to extract from this occurrence is preposterous.

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department has no power to remedy discriminatory discharges or other labor practices condemned by the national Act, and the New York State Labor Relations Act did not become effective until July 1, 1937. Fales, the Guild president, testified that the case was taken to the Board because of the publicity it would receive, and that the Guild had been informed that it was the Board's practice to bear the expenses of trial (R. 489–491).

[10] Compare the following remarks by Board counsel at the hearing: "The Board contends that the * * * employees were discharged not because of the merger but because of their activity in connection with the labor organization. The question of whether the Board can prove that is a question to be determined by the evidence to be presented before you" (R. 88–89); "I wish to say that the Government does not regard that information as confidential matter * * *" (R. 109); "The Board takes the position that there is no distinction between Frank E. Gannett as president of one company or as president of the other company" (R. 160); "I resent the statement that the Board is snooping into editorial matters" (R. 165). At page 124 of the record the trial examiner said that "I suppose the case will develop the theory of the Board that the Gannett Company is the parent company of The Press Co. * * *."

(b) To support its claim of bias, petitioner relies upon two unrecorded remarks which J. Warren Madden, the former Chairman of the Board, is asserted to have made at the oral argument of the case (Pet. 48).[11] When petitioner's counsel presented his "prejudgment" argument, the Chairman inquired whether he was accusing the three Board members of improper conduct. Counsel, refusing to clarify his charge, replied that he stood upon the record. The Chairman's characterization of such remarks as "sheer demagoguery," far from reflecting bias, constituted a proper exercise of the power of the Board to keep argument before it within the confines of decency (see R. 1309–1310, 1328–1329). Indeed, such conduct of counsel before a court vested with the usual contempt powers, might well have provoked a sterner and perhaps more effective reprimand (cf. R. 1328–1329).

6. Although the Court of Appeals modified the general cease and desist order (R. 1230) so as to enjoin petitioner only from "in any manner interfering with the administration of the Guild or its membership" (R. 1358), petitioner nevertheless contends (Pet. 18–19, 53–59) that the order is still too broad under the principles laid down in

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[11] The accuracy of petitioner's version of these remarks (R. 32, 39) is denied in the answers to the petitions for review, which are verified by Chairman Madden (R. 37, 43).

National Labor Relations Board v. *Express Publishing Co.*, No. 442, this Term, decided March 3, 1941. It is apparent, however, that the court's decree is not broader than is warranted by the "salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts." *Express Publishing* case, *supra.* The court sustained the Board's findings that by discriminatory discharges and surveillance petitioner interfered with the membership and administration of the Guild; upon these findings, the court's decree is no broader or more indefinite than the provision framed by this Court in the *Express Publishing* case itself. Indeed, the Court of Appeals should have enforced the even broader cease and desist provision on the ground that petitioner's unfair labor practices were not "isolated acts in violation of the right of self-organization", but on the contrary, constituted "persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board or the court below found or could have found the threat of continuing and varying efforts to attain the same end in the future." *Express Publishing* case, *supra.* Petitioner can hardly complain that it is the beneficiary of a more narrowly framed order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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